No. 83-2086

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

TALMADGE FRANKLIN FOSTER,
Petitioner

v.

KJELL FILLINGER,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

I. WHETHER CONCURRENT JURISDICTION EXISTS BETWEEN FEDERAL AND STATE REMEDIES IN A CASE OF LAND-BASED MARITIME INJURY ALLOWING AN INJURED WORKER TO ACCEPT ALABAMA WORKMEN'S COMPENSATION BENEFITS AND TO PURSUE A CO-EMPLOYEE DAMAGE SUIT AS ALLOWED UNDER ALABAMA LAW OR WHETHER SAID DAMAGE ACTION IS BARRED AS A MATTER OF LAW BY THE EXCLUSIVITY PROVISIONS OF THE LONGSHOREMEN AND HARBOR WORKERS' COMPENSATION ACT? (LHWCA)

LIST OF ALL PARTIES

A. Petitioner:

The Appellee/Plaintiff below:

TALMADGE FRANKLIN FOSTER

B. Respondent:

The Appellant/Defendant below:

KJELL FILLINGER

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama, case number 82-297, January 27, 1984, is attached as Appendix A.

The April 6, 1984 order of the Supreme Court of Alabama, case number 82-297, overruling petitioner's application for rehearing, is attached as Appendix B.

JURISDICTION

1. On January 27, 1984, the Supreme Court of Alabama entered its judgment reversing the jury verdict of $75,000.00 rendered in favor of petitioner, Talmadge Franklin Foster, against respondent, Kjell Fillinger, on the ground that the "exclusivity" provisions of the Federal Longshoremen and Harbor Workers' Compensation

Act (LHWCA), 33 U.S.C. §§ 901-950, entirely preempt state law and bar petitioner's right to elect state workmens' compensation benefits and recover money damages against a negligent co-employee for a land-based maritime injury. (Attached as Appendix A).

2. On April 6, 1984, the Supreme Court of Alabama denied petitioner's Application for Rehearing without written opinion. (Attached as Appendix B).

3. The jurisdiction of this court to review the judgment of the Supreme Court of Alabama, and to issue the Writ of Certiorari, is invoked pursuant to 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

This appeal involves the Alabama Supreme Court's ruling that the exclusivity provisions of the Longshoremen and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, completely preclude and preempt Alabama law allowing co-employee negligence suits arising from land-based maritime injuries.

The exclusivity provisions are set forth in § 933(i) as follows:

> "The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer or employee of the employer."

STATEMENT OF THE CASE

Petitioner, Talmadge Franklin Foster, was severely injured by an unguarded power tool on November 19, 1977, while employed by Kaiser Aluminum and Chemical Sales, Inc. at its land-based facility on Pinto Island in Mobile,

Alabama. Respondent, Kjell Fillinger, was the plant manager at the Kaiser facility and a co-employee of the petitioner, having the personal duty to provide the petitioner with a safe place to work and with safe tools and equipment with which to work.

After his injury, petitioner received state workmen's compensation benefits. He never applied for nor received any compensation benefits under the federal compensation scheme—the Longshoremen and Harbor Workers' Compensation Act. (TR 188-190).

At the time of his injury, the Kaiser facility had never been judicially determined to be within the jurisdiction of the LHWCA. Instead, petitioner and other workers injured at the plant were paid state compensation benefits only. Due to the more costly benefits allowed under the LHWCA, Kaiser fought to avoid the application of the federal compensation act to its plant. As respondent asserted on page three of his January 25, 1982 brief to the trial court ". . . Kaiser vigorously resisted the extension of coverage of the Longshoremens' and Harbor Workers' Compensation Act to its Pinto Island facility." Thus, at the time of his injury, petitioner's only known remedy was to pursue his state compensation benefits, an invaluable part of which is the right to sue negligent co-employees.

As a part of his state remedies, petitioner filed this action on August 9, 1978 in the circuit court of Mobile County, Alabama against respondent for negligently failing to provide petitioner with a safe place to work and with safe tools and equipment with which to work. On January 25, 1982, respondent filed a motion to dismiss the complaint for lack of subject matter jurisdiction alleging that the action against him as a co-employee of the petitioner was proscribed by the provisions of 33 U.S.C. § 933(i) of the Federal Longshoremen and Har-

bor Workers' Compensation Act (TR 44-45). After this motion was denied, the respondent refiled the motion based upon the exclusivity provisions of 33 U.S.C. § 933(i) but the same was again denied on September 17, 1982. (TR 130). Respondent filed his answer to the complaint as last amended on September 17, 1982 denying the allegations of the complaint and asserting as one of his affirmative defenses that the action against him was barred by the exclusivity provisions of 33 U.S.C. § 933(i).

The trial commenced on September 20, 1982. At the conclusion of petitioner's case, the respondent filed a motion for a directed verdict; which was denied by the trial court. (TR 141). This motion was refiled at the close of all of the evidence, but was denied again on September 22, 1982. (TR 142). On September 23, 1982, the jury returned a verdict for Talmadge Franklin Foster and against respondent, Kjell Fillinger, in the amount of Seventy-Five Thousand and No/100 ($75,000.00) Dollars. (TR 197). On October 14, 1982, respondent filed a motion for a judgment notwithstanding the verdict, or in the alternative, a new trial. This motion was denied by order dated November 19, 1982.

Kjell Fillinger filed his notice of appeal to the Supreme Court of Alabama on December 27, 1982. (TR 209-210). On January 27, 1984, the Supreme Court of Alabama entered its order and opinion reversing the trial court and expressly holding that the exclusivity provisions of the Federal Longshoremen and Harbor Workers' Act preclude, as a matter of law, petitioner's right to accept state workmen's compensation benefits and prosecute a co-employee negligence claim in a case of land-based maritime injury. (See Appendix A). Petitioner timely filed his application for rehearing to the Alabama Supreme Court, but the same was denied without order on April 6, 1984. (See Appendix B).

REASONS FOR GRANTING THE WRIT

Introduction

The Writ of Certiorari should be granted as this case falls squarely within Rule 17.1(c) and Rule 17.1(b) of the Rules of the Supreme Court of the United States designating the type of state court decisions which should be reviewed by this Court. Initially, the Supreme Court of Alabama, as the court of last resort for the State of Alabama, has decided an important question of federal law in direct conflict with the applicable decisions of the United States Supreme Court on the very same point. In this court's landmark decision of *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 65 L.Ed.2d 458, 100 S.Ct. 2432 (1980), the court held that in a case of land-based maritime injury, concurrent jurisdiction exists between federal and state remedies, and, as such, the LHWCA supplements, rather than supplants, state compensation law so that a state may validly apply its remedies to land-based maritime injuries falling within the coverage of the LHWCA. The ruling of the Alabama Supreme Court in the present action totally ignores this court's ruling on this very same point and deprives plaintiff of the substantial rights afforded him under the law of Alabama. Additionally, the Supreme Court of Alabama has decided this important federal question in direct conflict with the decisions of other state courts. Both of these reasons mandate review and reversal of the decision of the Alabama Supreme Court in this case.

I. WHETHER CONCURRENT JURISDICTION EXISTS BETWEEN FEDERAL AND STATE REMEDIES IN A CASE OF LAND-BASED MARITIME INJURY ALLOWING AN INJURED WORKER TO ACCEPT ALABAMA WORKMEN'S COMPENSATION BENEFITS AND TO PURSUE A CO-EMPLOYEE DAMAGE SUIT AS ALLOWED UNDER ALABAMA LAW OR WHETHER SAID DAMAGE ACTION IS BARRED AS A MATTER OF LAW BY THE EXCLUSIVITY PROVISIONS OF THE LHWCA?

In its order of January 27, 1984, reversing the jury verdict in favor of petitioner, the Alabama Supreme Court ruled that the exclusivity provisions of the LHWCA bar, as a matter of law, petitioner's co-employee damage suit against respondent (p. 1 Appendix A). Even though petitioner was injured within the State of Alabama in a land-based activity, and even though he had received only Alabama state workmen's compensation beenfits and had never applied for nor received any federal LHWCA benefits, the Alabama Supreme Court ruled that the LHWCA precludes his right to obtain his complete state remedies by prosecuting this co-employee negligence action. The Alabama Supreme Court's decision is erroneous and must be reversed as it is in direct conflict with applicable decisions of this court.

This court expressly ruled in the landmark decision of *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, supra, that in a case of land-based maritime injury, such as the case at hand, concurrent jurisdiction exists between federal and state remedies. This court specifically held that the application of the LHWCA merely supplements, rather than supplants, state law so that a state may apply its remedies to land-based maritime injuries falling within the coverage of the LHWCA.

This court need only recall the very first sentence in the *Sun Ship* opinion to discover the patent conflict between this court's previous ruling and the Alabama Su-

preme Court's ruling in the case at hand. In *Sun Ship*, this court unequivocally ruled:

> "The single question presented . . . is whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U.S.C. §§ 901-950. *We hold that it may.*" (emphasis added). Id. at 65 L.Ed.2d at 460.

In *Sun Ship*, plaintiffs, five workmen injured in land-based shipbuilding or ship repair activities, sought to recover compensation for their injuries under state law. The Pennsylvania Workmans Compensation Appeal Board upheld payment of benefits to the plaintiffs. Defendant appealed this determination on the ground that the LHWCA "was the employees' exclusive remedy". Id. at 460. On these facts, the United States Supreme Court held that in a case of land-based maritime injury, concurrent jurisdiction exists between Federal and State remedies, and, as such, the LHWCA supplements, rather than supplants, state compensation law so that a state may validly apply its own remedies to land-based maritime injuries falling within the coverage of the LHWCA.

In *Sun Ship*, this court traced the evolution of the act and case law in relation to land-based maritime injury. Prior to 1972, under the act and case law, it was well settled that a maritime but local injury could be compensated under the act or state law. Id. at 461-62. See, *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962); *Davis v. Department of Labor*, 317 U.S. 249 (1942). In 1972, the LHWCA was amended to provide a source of relief for certain injuries which had always been viewed as the province of state laws. However, these amendments did nothing to alter the prior rule allowing concurrent jurisdiction:

> "Absent any contradicting signal from Congress, the principles of *Davis v. Department of Labor, supra,*

> and of *Calbeck v. Travelers Insurance Co., supra,* direct the conclusion that the 1972 extension of federal jurisdiction *supplements, rather than supplants,* state compensation law. Given that the pre-1972 Longshoremens' Act ran concurrently with state remedies in the "maritime but local" zone, it follows that the post-1972 expansion of the Act landward would be concurrent as well. *For state regulation of worker injuries is even more clearly appropriate ashore than it is upon navigable waters.*" (emphasis added).

65 L.Ed.2d at 462-63.

This court further clarified the strong commitment to concurrent state and federal jurisdiction with the following caveat:

> "The language of the 1972 amendments cannot fairly be understood as pre-empting state workers' remedies from the field of the LHWCA, and thereby resurrecting the jurisdictional monstrosity that existed before the clarifying opinions in Davis and Calbeck."

Id. at 463.

The undeniable ruling of this court in *Sun Ship,* supra, is that workers injured in a land-based maritime accident, such as the petitioner, can pursue state remedies even though there may also be federal jurisdiction under the LHWCA. Thus, contrary to the opinion of the Alabama Supreme Court, state court jurisdiction exists in the case at hand. Since Alabama law expressly allows co-employee negligence actions in addition to the receipt of Alabama state workmen's compensation benefits, petitioner was entitled to recover both Alabama workmen's compensation benefits and to pursue his action against respondent. See, *Grantham v. Denke,* 359 So.2d 785 (Ala. 1978); *Fireman's Fund American Insurance Co. v. Coleman,* 394 So.2d 334 (Ala. 1981).

Moreover, as stated above, the basis of the Alabama Supreme Court's decision was the co-employee immunity

provision of the LHWCA provided in § 933(i). This section provides:

> "The right to compensation or benefits *under this chapter* shall be the exclusive remedy to an employee when he is injured . . . by the negligence or wrong of any other person or persons in the same employ." (emphasis added).

33 U.S.C. § 933(i).

Petitioner never received nor did he ever seek any benefits "under this chapter". As set forth in *Sun Ship*, supra, an Alabama worker injured in land-based maritime activity has an option—he can pursue his federal or state remedies. In the case at hand, petitioner properly pursued his state worker's remedies, a crucial part of which is his absolute right under the law of Alabama to pursue damage claims against any co-employees who negligently or wrongfully caused his injuries. The Alabama Supreme Court's opnion depriving petitioner of that right is violative of this Court's opinion in *Sun Ship, Inc.*, supra, and must be reversed.

Not only is the Alabama Supreme Court's decision violative of the *Sun Ship* opinion, but it is also violative of *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272, 79 S.Ct. 266, 3 L.Ed.2d 292 (1959). Haln was a water front employee injured while working on a barge in navigable waters in Oregon. He was covered by both LHWCA and the state workmen's compensation law. However, his employer had elected not to participate in the state workmen's compensation plan with the result that such state law allowed such an employee to sue his own employer for negligence and seek general damages. Hahn elected to pursue his more attractive state remedies but the trial court found for the employer. That judgment was affirmed by the Oregon Supreme Court which held that the sole remedy was LHWCA, the terms of which expressly prohibited an employee from suing his own employer for negligence.

Upon Writ of Certiorari, this court reversed, holding that since Hahn's injury occurred in the "twilight zone", the remedies were concurrent. Thus, LHWCA did not bar Hahn's claim for money damages, as opposed to compensation benefits, under state law. 3 L.Ed.2d at 294.

Hahn, supra, has never been overruled nor diminished in any way. It is instructive in the case at bar and should be followed. The prohibition in the 1959 amendment to LHWCA barring third party suits against fellow workers is no stronger nor any clearer than the provision in the original act of 1927 prohibiting an employee from suing his own employer. 33 U.S.C. § 905. The significance of *Hahn*, supra, is that the LHWCA simply does not apply at all when there is concurrent jurisdiction with the state workmen's compensation scheme and that state remedy is pursued to the absolute exclusion of LHWCA.

For these reasons, this court should grant petitioner's writ of certiorari. Rule 17.1(c) provides that certiorari may be granted:

> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court."

The case at hand falls squarely within the above rule compelling the issuance of a writ of certiorari.

Not only is the decision of the Supreme Court of Alabama in direct conflict with the above-mentioned United States Supreme Court decisions, the decision is also in direct conflict with numerous other state court decisions. The state courts of Texas and Louisiana have examined this same question and have reached the opposite but correct conclusion that under the concurrent jurisdiction scheme applying to maritime but local or land-based maritime activities an injured worker may pursue all his state remedies without fear of pre-emption by the LHWCA.

The state courts of Louisiana have consistently upheld concurrent jurisdiction between LHWCA and state remedies concerning land-based maritime injuries. Under these decisions, the allowable state remedies are not limited to "compensation" remedies but also expressly include an injured plaintiff's right to exercise all of his state remedies—both workmen's compensation benefits and co-employee negligence claims for damages.

In *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), the Louisiana Supreme Court held that as to land-based maritime injuries, concurrent jurisdiction exists between state and federal remedies thereby allowing an injured plaintiff to elect the more beneficial state workmen's compensation remedies along with his state co-employee negligence claims. *Poche* involved two consolidated appeals. In one, the survivors of Curtis Poche, Sr., who was killed in a land-based shipbuilding accident, brought suit for wrongful death. In the other, Aldrich Adam, who was injured in a land-based shipbuilding accident, brought suit against several executive officers and fellow employees in a negligence action. An inferior court dismissed the actions on the ground that the LHWCA created exclusive federal jurisdiction in this area. The Louisiana Supreme Court reversed and upheld plaintiffs' right to pursue full state remedies, including a co-employee negligence action.

In reaching its decision, the *Poche* court noted that minus a clear conflict and a clear intent to the contrary, concurrent jurisdiction should be allowed. The mere existence of a federal law does not preclude the operation of state law. Id. at 1217. The *Poche* court cited *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), wherein the Supreme Court stated:

> "While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the framers, it hardly follows from the constitutionality of that extension that we must sanctify the federal courts

> with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the state . . . Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law."

The *Poche* court further found no intent on the part of Congress to exclude workers covered under the Act from state remedies, particularly where state remedies exceeded the federal remedies. Thus, the court allowd state remedies to be used and said:

> "In sum, it is our opinion that the 1972 amendments to the LHWCA were intended to provide additional benefits for land-based maritime workers rather than to deprive them of rights and remedies which they already had. Louisiana has a legitimate interest in assuring the applicability of its compensation laws to injuries sustained within its jurisdiction. Accordingly, there should be no compelling reason to prohibit the legislature of this state from making available what, to some plaintiffs, may be a more attractive compensation scheme, so long as double recovery is not permitted."

Id. at 1221.

Similarly, in *Umbehagan v. Equitable Equipment Company*, 329 So.2d 245 (La. 1976), plaintiff was injured while engaged in shipbuilding in a fabrication building adjacent to a navigable waterway. The court held plaintiff's action under state law was allowable even though there was federal jurisdiction under the LHWCA. The court found that concurrent jurisdiction existed between state and federal remedies. The court noted an absence of any Congressional intent under the Act to preclude state remedies. Id. at 249.

More recently, after this court's decision in *Sun Ship, Inc.*, supra, Louisiana state courts have continued to reject the LHWCA "exclusivity" argument advanced by respondent and improperly adopted by the Alabama Su-

preme Court in the case at hand. In *Beverly v. Action Marine Services, Inc.*, 433 So.2d 139 (La. 1983), the parents of a land-based employee of a company in the business of repairing and cleaning ocean-going vessels, brought suit to recover benefits under the State of Louisiana Workers Compensation Act. Mr. Beverly had died after inhaling toxic fumes while cleaning out tanks moored on a vessel. The trial court held that the LHWCA was the exclusive remedy. The Supreme Court of Louisiana reversed, however, and held that the LHWCA was a remedy concurrent with the State Workers' Compensation Act and plaintiff could pursue either remedy to the exclusion of the other. Id. at 142. In discussing the concurrent jurisdiction existing on land-based maritime injuries between LHWCA and state remedies, the court specifically held:

> "When state law gives a right not available under the federal law, the state remedy can be pursued in preference to the federal statutory scheme."

Id. at 142.

Finally, in *Allen v. Keeney*, 442 So.2d 1171 (La. App. 1 Cir. 1983), the claimant brought a third party action against fellow workers to recover damages for personal injuries suffered by him in a tank explosion while building a ship over navigable waters in Louisiana. The worker's compensation law of Louisiana at that time allowed third party suits against fellow workers. The court held there was concurrent jurisdiction. Allen was covered by both the LHWCA and the state workers compensation law. In defeating the defendant's LHWCA "exclusivity" argument, the court expressly held that the injured worker could pursue his remedies under the state workmen's compensation laws to the absolute exclusion of LHWCA. In discussing the injured worker's right to elect his complete state remedies over the LHWCA in such a case of concurrent jurisdiction, the court stated:

> "It would make little sense to allow a right to elect (as we have done) and then to disallow the application of state law when it conflicted with federal law. Plaintiff can choose the more beneficial remedy when the jurisdiction is concurrent."

Id. at 1176.

In addition to the foregoing cases from the State of Louisiana, the Court of Civil Appeals of Texas reached a similar holding in *Johnson v. Texas Employers Insurance Association*, 558 S.W.2d 47 (Texas Civ. App. 1977). There, plaintiff sought to obtain state remedies for an on-the-job injury which occurred while he was employed at a shipyard. Although plaintiff was covered by the LHWCA, the Texas court expressly held that the federal act was not exclusive and cited *Poche v. Avondale Shipyards, Inc.*, supra, with approval. Id. at 50. Contrary to the opinion of the Alabama Supreme Court which is made the basis of this lawsuit, the Texas court held that Congress did not intend to preempt in any way the application of state law by its passage of the LHWCA. Id. at 52.

As the foregoing cases demonstrate, state courts of last resort for Alabama and Louisiana have decided this important federal question and have reached opposite results. The effect of this is that within the territorial limits of Louisiana, a plaintiff injured in a land-based maritime activity can exercise his right to receive full state workmen's compensaton benefits as well as his right to proceed under Louisiana's state law to prosecute a co-employee damage suit. Conversely, due to the decision reached by the Alabama Supreme Court in the case at hand, an employee injured within the territorial limits of the State of Alabama in such an accident is prohibited from enforcing his "concurrent jurisdiction" rights as set forth in *Sun Ship, Inc.*, supra, by obtaining state workmen's compensation benefits and prosecuting his state law co-employee negligence action. This is exactly

the type of state to state conflict concerning a federal law which should be reviewed by this court. As set forth in Rule 17.1(b) of the rules of the Supreme Court of the United States, a writ of certiorari should be granted when ". . . a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals."

CONCLUSION

The consequences of the ruling of the Alabama Supreme Court made the basis of this petition are very significant. Each year thousands of workers are injured in land-based maritime activity wherein concurrent jurisdiction exists between federal and state law. Many of those injuries occur near or adjacent to the navigable waters of Alabama wherein the injured employee has a state law right to prosecute a co-employee action against any fellow worker whose negligence caused his injuries. To allow the Alabama Supreme Court's decision to stand would deprive said workers of a very significant state right under the pretense of "federal preemption". As this court explicitly ruled in *Sun Ship, Inc.*, supra, no such federal pre-emption was intended by Congress in the 1972 amendments to the LHWCA. Thus, the decision of the Alabama Supreme Court is in direct conflict with this court's interpretation of the 1972 amendments to the LHWCA as well as the aforementioned state court decisions from other jurisdictions.

The granting of this petition will allow this court to finally resolve the substantial conflicts existing among the various states regarding the "exclusivity" provisions of the LHWCA, and to reinstate this court's stance on concurrent federal-state jurisdiction in the area of land-

based maritime activity. For the reasons contained herein, the writ should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1983-84

82-297

KJELL FILLINGER

v.

TALMADGE FRANKLIN FOSTER

Appeal from Mobile Circuit Court

MADDOX, JUSTICE.

Plaintiff, Talmadge Franklin Foster, while working as a "shipfitter" at a land-based operation, but who was covered under the provisions of the Federal Longshoreman's and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, sued his co-employee for injuries he allegedly sustained while working on the job. The issue before the Court is whether the exclusivity provisions of the LHWCA bars the suit. We hold that the exclusivity provisions of the federal act are controlling, and we reverse and remand.

The injury, which is the basis of this suit, occurred at the Kaiser Aluminum and Chemical Sales, Inc. plant on Pinto Island in Mobile. The Pinto Island plant manufactures storage tanks which are placed in ocean-going vessels at the plant site. The plaintiff, who was classified as

a "shipfitter," was injured while using a hand-held grinder to smooth out welds on the storage tanks. The grinder, which did not have a safety guard, "kicked back," and struck the plaintiff in the face.

After his injury, plaintiff applied for state workmen's compensation benefits. He never applied for compensation benefits under the LHWCA, although he was eligible for them. *See Waller v. Kaiser Aluminum & Chemical Sales, Inc.*, OWCP No. 6-47643 (March 13, 1981); *Clark v. Kaiser Aluminum & Chemical Sales, Inc.*, OWCP No. 6-47917 (June 9, 1981); *Campbell v. Kaiser Aluminum & Chemical Sales, Inc.*, OWCP No. 6-47914 (June 12, 1981); and *Sylvester v. Kaiser Aluminum & Chemical Sales, Inc.*, OWCP No. 6-45393 (July 7, 1981), holding the Kaiser facility came under the LHWCA.

Plaintiff, in his original complaint, and in all amended complaints, claimed that the defendant co-employee had personal duties and responsibilities in the area of safety at the Kaiser facility, and that these duties included providing him with a reasonably safe place to work and with reasonably safe tools and equipment with which to perform his work. Plaintiff claimed that the co-employee defendant, who was the plant manager, breached this duty by providing him with an unreasonably dangerous tool, and that his injury proximately resulted from the breach of this duty. Plaintiff testified at trial that he was never instructed to use a safety guard nor was he warned by any of his co-employees of the possibility that the grinder would "kick back."

Defendant raised as a defense the exclusivity provisions of the LHWCA by asking the court (1) to dismiss the claim, (2) to direct a verdict in his behalf, and (3) to enter a judgment in his behalf notwithstanding the fact the jury awarded plaintiff $75,000. The court denied each motion.

The defendant appealed and raises two issues on appeal: (1) whether the LHWCA bars the instant suit, (2) and

whether the defendant was guilty of any negligence which would subject him to personal liability. Because of our holding on the first issue, we do not reach the second.

Appellant/defendant argues that co-employee suits in state courts for damages are barred in cases falling under the provisions of the LHWCA and that the election of remedies doctrine has no bearing in this case, citing 33 U.S.C. §§ 901-950; *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Ex parte Alabama Oxygen Co., Inc.* 433 So. 2d 1159 (Ala. 1983); *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973); *Hughes v. Chitty*, 415 F.2d 1150 (5th Cir. 1969). The appellee/plaintiff contends that in a case of land-based maritime injury, concurrent jurisdiction exists between federal and state *remedies* and that the plaintiff is not barred by the LHWCA *unless* he elects to pursue remedies under the LHWCA, citing *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976); *Umbehagen v. Equitable Equipment Co.*, 329 So. 2d 245 (La. Ct. App. 1976); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

Although both parties argue diversely about the intent of Congress in passing the exclusivity provisions of the LHWCA, they agree that the plaintiff was covered by the LHWCA; therefore, whether plaintiff could maintain his state court action requires us to construe the act to determine the intent of Congress in passing the LHWCA and the amendments thereto.

We find it unnecessary to delineate the historical background of the LHWCA, except to point out that since passage of the Act, Congress has progressively extended coverage under the act to maritime workers employed in land-based activities. *See* G. Gilmore & C. Black, *The Law of Admiralty* (1975); A. Larson, *2A, 4 Workmen's Compensation Law* (1983); *Sun Ship, supra; Washington Gas Light Co., supra.*

For example, in 1972 Congress amended the LHWCA to cover more maritime employees under more situations, probably because of a statement made by Justice White in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). *See also* Tucker, *Coverage and Procedure Under the LHWCA*, 55 Tul. L. R. 1056 (1981).

> "While we have no doubt that Congress had the power to [extend LHWCA jurisdiction landward] in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Southern Pacific Co. v. Jenson*, 244 U.S. 205 (1917), separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court."

Nacirema Operating Co., supra, 396 U.S. 223-24.

To "move" that line landward, Congress amended 33 U.S.C. § 902(3) and § 903(a). Now 33 U.S.C. § 902(3) reads, in pertinent part:

> "[E]mployee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder. . . ."

Also 33 U.S.C. § 903(a) now reads in pertinent part:

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*). (Emphasis added.)

Congress did not amend 33 U.S.C. § 933(i), which reads as follows:

> "The right to compensation or benefits under this chapter shall be *the exclusive remedy to an employee* when he is injured, or to his eligible survivors or legal representatives if he is killed, *by the negligence* or wrong of *any other person* or persons *in the same employ: Provided, That this provision shall not affect the liability of* a person other than an officer or *employee of the employer.* [Emphasis added.]
>
> "Mar. 4, 1927, c. 509, § 33, 44 Stat. 1440; June 25, 1938, c. 685, §§ 12, 13, 52 Stat. 1168; Aug. 18, 1959, Pub.L. 86-171, 73 Stat. 391; Oct. 27, 1972, Pub.L. 92-576, § 15(f)-(h), 86 Stat. 1262."

Appellant strongly argues that, as a matter of federal laws, specifically 33 U.S.C. § 933(i), the plaintiff was presented from maintaining a co-employee *damage* suit. Appellant's argument is based upon the proposition that to allow a co-employee suit by a covered maritime employee when the federal statute specifically prohibits such suits would be to create the "type of federal-state conflict in which, under long established principles of federal pre-emption, pre-emption of state law is required."

Appellee contends that in a case of a land-based maritime injury, *concurrent jurisdiction* exists between federal and state remedies. In fact, appellee contends that the U. S. Supreme Court in *Sun Ship, supra,* has held that the LHWCA does not preclude concurrent state jurisdiction under a state workmen's compensation act in a case involving a harbor worker injured on land. Appellee states that this was the sole issue in *Sun Ship, supra,* as is apparent from the opinion, and that the issue was decided in his favor. The Court, in *Sun Ship, supra,* opined:

> "The single question presented by these consolidated cases is whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as

amended in 1972. 33 U.S.C. §§ 901-950. We hold that it may."

Sun Ship, supra, 447 U.S. at 716.

Appellant counters that "a distinction should be observed between the pre-emption of co-employee negligence actions for damages and the area in which some degree of overlap between the Longshoremen's and Harbor Workers' Compensation Act and the Alabama Workers' Compensation Act is permitted."

Appellant argues "that "a careful reading of the *Sun Ship* decision indicates that the *only* permissible concurrent jurisdiction between federal and state compensation laws is concurrent application of 'compensation benefit' levels." He says "That is, 'workers who commence their actions under state law will generally be able to make up the difference between state and federal *benefit levels.*'" (Emphasis supplied).

Appellant argues:

> "The difference between *benefit* levels, however, refers to the schedule of compensation benefits, for example, for injuries to limbs, disfigurement and other categories in which weekly or biweekly benefit awards are made. This is something wholly different from the situation presented here, involving an action for damages, in which there is a clear conflict between, the federal statute prohibiting co-employee damage suits and the state common law of Alabama which allows it."

In our research, we have found that after it decided *Sun Ship,* the Supreme Court later decided that the Full Faith and Credit Clause of the U.S. Constitution does not preclude successive workmen's compensation awards, since a state has no legitimate interest within the context of the federal system in preventing another state from granting a supplemental award when the second state could have applied its workmen's compensation law in

the first instance. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). Neither *Sun Ship, supra,* nor *Washington Gas Light Co., supra,* however, involved the precise question before us today—whether there can be concurrent jurisdiction to award *damages* to an injured plaintiff. Other courts have addressed the issue, however. The Louisiana Supreme Court held that a land-based maritime employee covered by the LHWCA could sue a co-employee under that state's workmen's compensation law. *Poche v. Avondale Shipyards, Inc.*, 339 So. 2d 1212 (La. 1976). Earlier, Louisiana had merely recognized the overlap in compensation benefit levels only. *Umbehagen v. Equitable Equipment Co.*, 329 So. 2d 245 (La. Ct. App. 1976). The rationale of the *Poche* court was based on the election of remedies doctrine which has been severely criticized by the authorities and which has been held to be inapplicable in a case involving the LHWCA. *See* A. Larson, *2A Workmen's Compensation*, § 73 (1983); *Landry v. Carlson Mooring Service*, 643 F. 2d 1080 (5th Cir. 1981). The *Poche* court's decision was also based upon an interpretation of Louisiana's workmen's compensation law and upon prior Louisiana court decisions. The *Poche* decision was rendered before the Supreme Court's decision in *Sun Ship supra,* wherein the Court indicated that in a case involving the LHWCA and a state workmen's compensation scheme in which there was an indisputable preclusion of LHWCA remedies, the federal law would "pre-empt the state compensation exclusivity clause." *Sun Ship,* 447 U.S. at 722. We consider the *Poche* and *Umbehagen* decisions in view of these statements of the law in *Sun Ship, supra.*

In the resolution of the question presented we are aided by other state and federal decisions. The Florida District Court of Appeals held the LHWCA took precedence over state law as to whether the employer could be assigned all rights of persons entitled to recover dam-

ages from third persons in a wrongful death action. *United States Fidelity and Guaranty Co. v. Reed Construction Corp.*, 132 So. 2d 626 (Fla. Dis. Ct. App. 1961). The Supreme Court of South Carolina held the LHWCA was the "sole and exclusive remedy" of a plaintiff suing a co-employee in a negligence action. *Smalls v. Blackmon*, 239 S.E. 2d 640, at 640 (S.C. 1977). That court specifically cited 33 U.S.C. § 933(i). In *Smalls* the negligence action was clearly a shore-based maritime accident, as the plaintiff and defendant were involved in an automobile accident located at the Parris Island Marine Corps Exchange Service Station.

The *Smalls* court relied upon *Nations v. Morris*, 483 F. 2d 577 (5th Cir. 1973), cert. denied, 414 U.S. 1071 (1973) to reach its holding. *Nations* involved a plaintiff injured on an oil drilling rig located 40 miles off the coast of Louisiana. The plaintiff brought a co-employee action in federal court. Chief Judge Brown, writing for the appeals court, held that the LHWCA prohibited co-employee suits in this situation. In dicta, the *Nations* court indicated the LHWCA would apply to "twilight" or shore-based injuries, too. "L&H [LHWCA] applies during the dark of night, at the break of dawn and in the twilight too." *Nations, supra*, at 584. In a case involving an injury on a floating dry dock located in a repair yard in a marine repair facility in Louisiana, the Fifth Circuit had earlier held that the exclusivity provisions of the LHWCA were constitutional and that they barred co-employee suits. *Keller v. Dravo Corp.*, 441 F. 2d 1239 (Fifth Cir. 1971). The *Keller* court cited 33 U.S.C. § 933(i) as the controlling provision. *See also Fitzgerald v. Compania Naviera La Molinera*, 394 F. Supp. 402 (E. D. La. 1974), citing *Keller, supra*; *Bynum v. S. S. Montmacteal*, 188 F. Supp. 763 (E. D. Pa. 1960), which discusses the purpose of Congress's passage of 33 U.S.C. § 933(i):

> "The 1959 amendment to § 33 simply recognized the problem [of co-employee suits] and solved it by

forbidding such an action. In other words, the 1959 amendment to § 33 of the Act not only does not limit the provisions of § 5, but broadens them by insulating not only the employer, but also the fellow employees of the injured party from any liability in damages to the injured party. This is made clear by the legislative history of the amendment. U.S. Code Congressional and Administrative News, 86th Congress, First Session 1959, Volume 2, pages 2134-2136. With respect to the amendment now relied on by libellant, the Senate Report, under the heading 'Purpose Of The Bill', states as follows at page 2135:

> " 'The other major provision of the bill relates to the immunization of fellow employees against damage suits. The rationale of this change in the law is that when an employee goes to work in a hazardous industry he encounters two risks. First, the risks inherent in the hazardous work and second, the risk that he might negligently hurt someone else and thereby incur a large common-law damage liability. While it is true that this provision limits an employee's rights, it would at the same time expand them by immunizing him against suits where he negligently injures a fellow worker. It simply means that rights and liabilities arising within the 'employee family' will be settled within the framework of the Longshoremen's and Harbor Workers' Compensation Act.' "

Bynum, supra at 764-765. *Hughes v. Chitty*, 415 F.2d 1150 (Fifth Cir. 1969), held that the LHWCA was the exclusive remedy for a longshoreman injured on navigable water.

We are sensitive to the statement made in *Sun Ship, supra*, that a state may apply its workers' compensation scheme to land-based injuries that fall within the cover-

age of the LHWCA, but we believe the concurrent jurisdiction for pursuit of benefits under a state's workmen's compensation scheme does not include common law suits for damages against co-employees.

We are of the opinion that the LHWCA and the law of Alabama are in serious conflict as to the maintenance of co-employee suits, and because that is the case, we hold that federal law will pre-empt state law. *Florida Lime & Avocado Growers, Inc. v. Paul*, —— U.S. ——, 103 S. Ct. 1453 (1983); *Howard v. Uniroyal, Inc.*, 543 F. Supp. 490 (M.D. Ala. 1981); *Ex parte Alabama Oxygen Co., Inc.*, *supra*. If the "enforcement of state law 'presents a serious danger of conflict with the administration of the federal program . . .'" the federal law must take precedence. *Uniroyal, supra* at 492. We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his co-employee because he was a land-based maritime worker, and a maritime worker injured on a navigable waterway would be precluded from maintaining such a suit; therefore, we are persuaded to hold that the exclusivity provisions of 33 U.S.C. § 933(i) apply and that the state action was barred.

Because of our holding on the issue of pre-emption, we need not address the second issue raised by the defendant on appeal. For the foregoing reasons, the judgment of the trial court is reversed and the cause remanded in accordance with this opinion.

REVERSED AND REMANDED.

Torbert, C. J., Faulkner, Jones, Almon, Shores, Embry, Beatty and Adams, JJ., concur.

APPENDIX B

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Telephone: 261-4609

Mailing Address:

P.O. Box 157
Montgomery, Alabama 36101

Re: 82-297

KJELL FILLINGER

Appellant

vs.

TALMADGE FRANKLIN FOSTER,

Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

☐ Appeal docketed. Future correspondence should refer to the above number.

☐ Court Reporter granted additional time to file reporter's transcript to and including

☐ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

☐ Appellee ———— granted 7 additional days to file briefs to and including

☐ Appellant(s) granted 7 additional days to file reply briefs to and including

☐ Record on Appeal filed

☐ Appendix Filed

☐ Submitted on Briefs

☐ Petition for Writ of Certiorari denied. No opinion.

☒ Application for rehearing overruled. No opinion written on rehearing.

☐ Permission to file amicus curiae briefs granted

☐ _____

April 6, 1984
bsa

/s/ Robert G. Esdale
ROBERT G. ESDALE
Clerk
Supreme Court of Alabama

NO. 83-2086 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TALMADGE FRANKLIN FOSTER,

Petitioner

versus

KJELL FILLINGER,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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31PP

QUESTION PRESENTED

The question which Petitioner seeks to present to this Honorable Court is more properly stated as whether the Petitioner, who was injured while working as a "shipfitter" at a land-based operation, but who was covered under the provisions of the Federal Longshoremen's and Harborworkers' Compensation Act (LHWCA) 33 U.S.C. §§901-950, could, in addition to receiving benefits under the Alabama Workmen's Compensation Act, also sue his co-employee for injuries he sustained while working on the job or is such action for damages barred by the exclusivity provisions of LHWCA.

PARTIES TO THE PROCEEDING

The following listed persons have an interest in this case.

1. Talmadge Franklin Foster

2. Kjell Fillinger

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NO. 83-2086

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TALMADGE FRANKLIN FOSTER,

Petitioner

versus

KJELL FILLINGER,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

REASONS FOR NOT GRANTING WRIT

The Alabama Supreme Court correctly held that the exclusivity provisions of the Federal act were controlling and that Petitioner's state action for damages against Respondent herein, his co-employee, was barred. The basis of the Court's holding is set forth as follows:

> "We are sensitive to the statement made in *Sun Ship, supra,* that a state may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the LHWCA, but we believe the concurrent jurisdiction for pursuit of benefits

> under a state's workmen's compensation scheme does not include common law suits for damages against co-employees."

Fillinger v. Foster, 448 So.2d 321, 326 (Ala. 1984). See also pages 9a and 10a of Appendix to Petitioner's brief.

The decision of the Alabama Supreme Court which is set forth in Appendix A to Petitioner's Brief [and reported in 448 So.2d 321 (Ala. 1984)] contains a full and complete discussion of the contentions of the parties and correctly sets forth the law applicable thereto.

Respondent asserts that the Supreme Court of Alabama properly held in this case that as a matter of Federal law the Petitioner was absolutely prevented from maintaining his suit for damages against his co-employee in this case due to the preclusion and/or absolute prohibition mandated by 33 U.S.C. § 933(i) as follows:

> "The right to compensation and/or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, and/or to his eligible survivors or legal representatives if he is killed, by the negligence and/or wrong of any other person and/or persons in the same employ: Provided, That this provision shall not affect the liability of a person other than an officer and/or employee of the employer."

The decision of the Alabama Supreme Court fully recognized and followed the holding of this Court in *Sun Ship, Inc. v. Commonwealth of Pennsylvania*, 447 U.S. 715, 65 L.Ed.2d 458, 100 S. Ct. 2432 (1980) that a state may apply

its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor-workers' Compensation Act (LHWCA), as amended in 1972. In fact, the state did apply its workers' compensation scheme since the Petitioner applied for and received benefits under the Alabama Workers' Compensation Act.

This Court in *Sun Ship, Inc. v. Pennsylvania, supra,* considered only a single question which was stated as follows:

> "The single question presented by these consolidated cases is whether a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U.S.C. §§901-950. We hold that it may."

However, the Alabama Supreme Court held in *Foster v. Fillinger, supra,* that common law suits for damages against a co-employee are not part of the Alabama workmen's compensation scheme. (See pages 9a and 10a of Appendix to Petitioner's brief.)

We submit that the Supreme Court of Alabama is the sole arbiter of which state remedies should be considered part of that state's workers' compensation scheme and it has ruled such scheme does not include common law suits for damages against a co-employee. It should be noted that Petitioner failed to argue that specific point in the proceedings below and has failed to address that issue in these proceedings. It is respectfully submitted that such a finding by the Alabama Supreme Court is binding on this Court.

The Alabama Supreme Court's decision did not hold that concurrent jurisdiction did not exist nor did it impose a limit on the scope and application of the LHWCA but rather the Court imposed a limitation on the application and operation of a state-created remedy seeking damages as opposed to benefits under its workmen's compensation scheme.

Furthermore, there is no conflict between the LHWCA and the state workmen's compensation act with respect to benefits. Under Alabama law the right of an injured employee to sue a co-employee for damages does not arise under the Alabama Workmen's Compensation statute but rather is a separate right recognized by common law. *Grantham v. Denke*, 359 So.2d 785 (Ala. 1978). The decision below firmly established that this right is not part of Alabama's workers' compensation scheme.

Petitioner does not controvert the fact that his employer, Kaiser Aluminum & Chemical Sales, Inc. was a covered facility under LHWCA nor that both he and the Respondent were co-employees. Instead, Petitioner seeks the right to reject his rights and remedies under LHWCA and having sought and received benefits under the Alabama Workmen's Compensation law now, in addition, seeks to file a suit for damages under the state common law against his co-employee, the Respondent herein. Thus Petitioner, while arguing the doctrines of concurrent remedies and election of remedies, seeks to unilaterally abrogate the rights of immunity granted co-employees under LHWCA and, in particular, the Respondent herein.

The decision of the Alabama Supreme Court follows the holding of this Court in *Sun Ship, Inc., supra,* and is not inconsistent therewith and for that reason the writ should not be granted.

ARGUMENT

I. THIS ACTION IS BARRED BY THE CO-EMPLOYEE IMMUNITY PROVISION OF 33 U.S.C. §933(i).

The Alabama Supreme Court reaffirmed that the overlap between the LHWCA and State non-damages, compensation *benefits*, allowed by this Court in *Sun Ship*, does not mean, as Petitioner contends, that co-employee *damages* remedies may also be permitted under both Federal and State schemes. The reasons are two-fold: (1) the possibility of an overlap between inconsistent damages remedies was not discussed in any manner or allowed by *Sun Ship*, and (2) there is a clear statement of intended preemption of State law and, in particular, of State law co-employee damages remedies in §933 (i) of the LHWCA which grants co-employee immunity at facilities covered by the LHWCA.

The Alabama Supreme Court has properly rejected Petitioner's contention that Plaintiffs in Alabama may make an election of remedies in favor of State or Federal law - - even inconsistent provisions with respect to co-employee immunity, so that, if the former is chosen, no recourse may be made to the latter, and the co-employee immunity in the latter may be disregarded.

A. THERE IS NO OVERALL CONCURRENT JURISDICTION BETWEEN THE LHWCA AND STATE LAW WHERE FEDERAL RIGHTS TO §933 (i) CO-EMPLOYEE IMMUNITY APPLY.

Although there may be an overlap in benefit levels so that a claimant "will *generally* be able to make up the difference between state and federal *benefit* levels, (*Sun Ship*, *supra*, at 465) (Emphasis added), there is no doubt that this

Court in that decision did not address the possibility of *overall* concurrent jurisdiction between the Federal and State Acts. Clearly, the Court instead allowed concurrent remedies *only* with respect to benefit levels. The definitions in the Act, "benefits" are wholly separate and different from "damages" - - each of which are strictly regulated by the Federal scheme. This contrast between disability "benefits" and "damages" based on tort liability is also recognized at 2 Larson, *Workmen's Compensation Law*, §§ 57.10, 57.11 (1981). It should be noted that the strict definitions of "benefits" and "damages" in the Act are consistent with the most recent United States Supreme Court decision construing the Act which, consistent with the foregoing, also stated a limited definition of "wages" under the Act. See *Morrison-Knudsen Construction Co. v. Director, OWCP,* _____ U.S. _____, 76 L.Ed.2d 194, 103 S. Ct. _____ (1983).

A careful reading of *Sun Ship* shows unquestionably that this Court left open the very question presented in this case: i. e., the extent and operation of partial federal preemption of State co-employee damages actions which conflict with §§ 905 and 933 (i) of the Act. Significantly, *Sun Ship* indicates that, *if necessary*, federal preemption under the LHWCA *may be required* in certain situations. Should this necessity arise, however, the Court has indicated that it would prefer the least restrictive preemption possible - - or partial preemption.

> [W]e observe that if federal preclusion ever need be implied . . . . a less disruptive approach would be to pre-empt the state compensation exclusivity clause, rather than to pre-empt the entire state compensation statute as Appellant suggests.

Sun Ship, at 465 n.6.

This is precisely the manner of preclusion or preemption which the Alabama Supreme Court recognized: it is *only* the aspect of Alabama common law allowing co-employee damage suits between longshoremen and harborworkers that should be preempted - - a partial preemption rather than preemption of the entire scheme of State compensation damages and benefit law. In fact, no part of the state workmen's compensation scheme was preempted or disturbed, only the separate and distinct right to pursue a common law right against co-employers has been precluded. Section 905(b) of the Federal Act would also allow certain third-party damage actions to remain intact. Thus, this partial preemption is precisely what this Court has indicated it would favor in such a situation "if federal preclusion ever need be implied . . . ." *Id.* at 465. It is also significant to observe that this statement alone, without further elaboration, is evidence of the fact that this Court did indeed foresee that in certain situations federal preemption would be necessary when provisions of the LHWCA were in clear conflict with other laws.

Thus, it is clear that there is no overall concurrent jurisdiction between the Federal and State Act. Instead, the only concurrence which has been allowed is the limited situation involving compensation benefits in which a worker is free to make up the difference between "benefit levels." *Id.* This alone is the holding in *Sun Ship*, and is also the limited ruling in one of the State Court decisions argued by Petitioner, *Umbehagen v. Equitable Equipment Co.*, 329 So.2d 245 (La. App. 1976). The decision in *Umbehagen* merely recognized the overlap in compensation benefit levels. Just as in *Sun Ship*, *Umbehagen* did not involve the question whether a State law co-employee damages action was preempted by the co-employee immunity in §933(i).

B. THERE CAN BE NO ELECTION OF REMEDIES BETWEEN INCONSISTENT PROVISIONS OF THE LHWCA AND STATE LAW.

Petitioner's primary argument to the preemption arguments is that, regardless of the federal statutes, Petitioner had the right to elect his remedies - - i. e., either federal or state." (P. 9, Brief of Petitioner). This election of remedies argument is also the basis or rationale for the other State Court cases on which Petitioner places considerable reliance, *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *Allen v. Keeney*, 442 So.2d 1171 (La. App. I Cir. 1983), and *Beverly v. Action Marine Services, Inc.*, 433 So.2d 139 (La. 1983). *Poche* allowed a co-employee damage suit regardless of the Plaintiff's harborworker status, to "a plaintiff who has *elected* to proceed under the Louisiana Workmen's Compensation statute." *Id.* at 1221. (Emphasis added).

However, a Federal Court decision, considering the argument that there could be a binding election of remedies between State workers' compensation laws and the LHWCA, the same argument from *Poche* on which Petitioner relies, found that clearly *this could not be done*. Instead, as the United States Court of Appeals for the Fifth Circuit stated, such an election of remedies was *"irrelevant."*

> [I]t is quite clear that election of remedies is irrelevant in the context of Landry's case; there is no indisputable Texas preclusion of recourse to LHWCA remedies after litigation of a Texas workers' compensation claim, and thus, there is simply no basis for finding an election between mutually exclusive alternatives.

Landry v. Carlson Mooring Service, 643 F.2d 1080, 1087-1088 (5th Cir. 1981). Thus, the Fifth Circuit has removed the entire rationale for *Poche* so that this State Court decision has been, in effect, overruled. Also, as one Texas Appellate Court Judge has observed, the validity of *Poche* can be "disposed of in a single sentence," namely - - "*Poche* reached the Supreme Court of the United States . . . and the appeal was dismissed on October 3, 1977 [citations omitted]." *Johnson v. Texas Employers Insurance Assoc.*, 558 S.W.2d 47, 53 and 53 n. 2 (Tex. Civ. App. 1977) (Keith, J., dissenting).

The *Landry* decision takes on further significance given the statement in *Sun Ship* that "a less disruptive approach would be to pre-empt the state compensation exclusivity clause. . . ." *Sun Ship, supra,* at 465 n. 6. Obviously, this is the same form of exclusivity clause referred to in *Landry*, the absence of which would prevent a binding election of remedies in favor of State law.

The two Louisiana cases cited by Petitioner, *Allen v. Keeney, supra,* and *Beverly v. Action Marine Services, Inc., supra,* both followed and relied on the rationale set forth in *Poche v. Avondale Shipyards, Inc. supra,* which, as the Supreme Court of Alabama pointed out on page 6 of its Opinion, has been severely criticized by the authorities and has been held to be inapplicable in a case involving the LHWCA.

The Louisiana cases further mistakenly base their decisions on the "Twilight Zone" theory. The significance of the Twilight Zone theory has been rendered moot by the 1972 Amendments to the LHWCA. See also generally Gilmore and Black, *The Law of Admiralty*, § § 6-49 et seq. (2d Ed. 1975), *Landry v. Carlson Mooring Service*, 9 BRBS 518 at 520 and

525 (1978) reversed 643 F.2d 1080 (5th Cir. 1981).

Thus, Petitioner's argument presents a contradiction: (a) *Landry* says that unless State law contains a provision which is an "indisputable preclusion of LHWCA remedies," there can be no election of remedies - - but (b) *Sun Ship*, says that one illustration of preferred partial preemption involving LHWCA and State law conflicts would be "to preempt the state compensation exclusivity clause. . . ." *Sun Ship, supra,* at 465 n. 6. The result is that the Supreme Court has already ruled that it would preempt the very exclusivity provision of State law which might otherwise allow Petitioner's asserted justification of an election of remedies in favor of Alabama law. In any event, however, Petitioner's argument is somewhat academic in view of the fact that neither Alabama nor Texas (the State involved in *Landry*), have such a State exclusivity clause. As this Court has observed, "[a]pparently only Nevada's Workmen's Compensation Act contains the unmistakable language" precluding a supplemental award of compensation benefits from another State or federal system. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 65 L.Ed.2d 757, 769 n. 21, 100 S. Ct. 2647 (1980). It should be noted that *Thomas* is additional precedent that rejects the election of remedies rationale in *Poche* by refusing to preclude recourse to District of Columbia compensation benefits where previous Virginia benefits were obtained. *Id.* at 776. Significantly also, the permitted overlap was with *benefits* only, and not with damages which would be in violation of co-employee immunity. This case has added significance since the District of Columbia Act involved in *Thomas* incorporates the LHWCA. D. C. Code §§ 501-502 (1968). See also *Thomas, supra,* at 762 n. 2. A similar election of remedies argument has been rejected in a conflict between the New York Compensation Law and the LHWCA. See *Morris v. Cleanco Industrial Services, Inc.*,

444 N.Y.S. 2d 206 (1981). *Morris* is important since the LHWCA is modelled on the New York Act. 4 Larson, *Workmen's Compensation Law*, §39.10, at p. 16-156 (1973).

C. AS THIS COURT HAS RECOGNIZED IN TRADITIONAL ADMIRALTY CASES, FEDERAL COURT DECISIONS PROVIDE THE APPLICABLE BODY OF LAW CONSTRUING §933(i).

In a case involving a Federal question of the nature presented here, where the result is governed by a Federal statute, the decisions of Federal Courts should be more persuasive and given more weight than the Louisiana State Court decisions argued by Petitioner. The reason for this is that, as the LHWCA makes clear, it was intended to create a *uniform Federal compensation law* which, where applicable, would preempt conflicting State statutes. Thus, for example, in a recent Federal Court decision involving a conflict between certain provisions with respect to damages in the Oregon Employers' Liability Act ("OELA") and the LHWCA, the following statement of the preemptive intent of the LHWCA was made:

> The OELA imposes a stricter standard upon the employer than either general maritime law or Section 905(b) negligence law. Congressional history demonstrates that Section 905(b) [referring to the damages remedies permitted by the LHWCA] was intended to create a *uniform federal law which would preempt conflicting state statutes* [citations omitted].

> Consequently, the OELA does not apply to this action. [Additional citation omitted].

Croshaw v. Koninklijke Nedlloyd, B. V., 398 F. Supp. 1224, 1227 (D. Ore. 1975). (Emphasis added).

Thus, workers' compensation laws of Oregon, Alabama or any other State cannot interfere with the intended uniformity of the LHWCA. It also follows that neither Alabama, Oregon nor any other State law can regulate the standard of care applicable in third-party damage suits under §905(b) or other damages provisions in conflict with the LHWCA. For the same reason, no state law should be permitted to interfere with the co-employee immunity granted in §933 (i) where the LHWCA covers the protected or immunized employees.

The preclusive effect of the LHWCA, and all questions involving construction of the Act, are a matter of Federal law and for that reason it is the Federal Court cases construing the Act and §933 (i) which this Court should follow rather than the Louisiana law Petitioner cites. As the United States Court of Appeals for the Fourth Circuit has observed in a case involving another provision from the LHWCA:

> The legislative history is unambiguous that it is a uniform federal law, *not state law*, to which we must turn. . . .

Duty v. Eastcoast Tender Service, Inc., 660 F.2d 933, 938 (4th Cir. 1981). (Emphasis added). The United States Supreme Court has also recognized this principle - - that the LHWCA involves a special class of workers protected by Federal law so that contrary principles from State law, where there is a conflict, should be disregarded in favor of

the necessity for uniform construction of the Act. See generally *Jones & Laughlin Steel Corp. v. Pfeifer*, _____ U.S. _____, 76 L.Ed.2d 768, 103 S. Ct. 2541 (1983). Thus, in the *Pfeifer* case, because a Federal statute was involved (the LHWCA), the interests of uniformity required that a lower Court be reversed for applying State standards for determining lost earnings in a §905(b) third-party damages action, rather than the uniform Federal standard required by the Act.

> [T]he reasons which may support the adoption of a rule for a State's entire judicial system. . . are not necessarily applicable to the special class of workers covered by this Act.

Pfeifer, supra, at 4802. For that reason, various State law formulas for computing lost earnings were rejected in favor of the uniform Federal standard required in §905(b) of the LHWCA.

It is significant, also, to note in this regard that the enactment of the Longshoremen's and Harborworkers' Compensation Act, and in particular the extensive amendments and re-enactment in 1972, was based upon the Congress' legislative jurisdiction over *admiralty*. This is noted in the legislative history of the 1972 amendments as follows:

> Congress was cautious in its language, but the fact remains that it intended to expand the scope of the LHWCA to provide a federal workmen's compensation remedy for all maritime employees. We believe that Congress has exercised in full its legislative jurisdiction in admiralty.

Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629, 638 (3rd Cir. 1976). (Quoting House and Senate Report to 1972 amendments to LHWCA). Thus, as a legislative enactment pursuant to the Congress' admiralty power, there can be no doubt that State Courts should apply and recognize the Federal Court decisions defining the preemptive effect of §933(i).

The Court in *Keller v. Dravo Corp.*, 441 F.2d 1239 (5th Cir. 1971), cert. denied 404 U.S. 1017, 30 L.Ed.2d 665, 92 S. Ct. 679 (1972), faced with the same conflict involved here - - between §933(i) and State law which purported to allow co-employee damages suits, not only disallowed the suit, but went further to observe that such co-employee damages suits had been *abolished*. The following language from this decision is significant:

> Keller's right to sue his employer, its officers and his fellow-employees had not accrued and become vested before it was *abolished* by the limitation of §933(i).
>
> * * *
>
> The limitation contained in §933(i) is in no way violative of the Fifth and Fourteenth Amendments. Since the subsection granting immunity is constitutional, the trial judge was correct in granting a Motion for Summary Judgment in favor of the individual McDermott employees.

Keller, supra, at 1242 (Emphasis added). The *Keller* decision should mean that in this case as well the Plaintiff's co-employee damages cause of action, recognized for the

first time in Alabama in the 1978 decision, *Grantham v. Denke*, Ala., *supra*, had not become vested before it was abolished by the 1927 enactment of the Longshoremen's and Harborworkers' Compensation Act, or the 1972 Amendments to the Act.

See also *Hughes v. Chitty*, 415 F.2d 1150 (5th Cir. 1969) and *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), cert. denied 414 U.S. 1071, 38 L.Ed.2d 477, 94 S. Ct. 584 (1973).

In *Nations, supra*, it was specifically held that (a) between employer and employee, and (b) between co-employees, where there is coverage by the LHWCA, the Act provides the exclusive remedy:

> We are firm in the view that as between employee and employer (or fellow employee) L&H [the LHWCA] is the sole measure and this excludes a land based damage action against the fellow employee.

Nations, supra, at 586. The same result occurred in *Chitty*, where the following holding of a District Court was affirmed:

> The district court dismissed the action against Canulette and Wall on the grounds that Hughes' sole remedy was under the Longshoremen's Act and that this Act grants immunity to fellow employees from damage suits.

Chitty, supra, 1152. In upholding the District Court's decision which considered the same State and Federal law conflict involved here, the Court of Appeals again made very clear that, even if State law purports to allow a co-employee

damage suit, if the defendant-employees are also covered by the LHWCA, they *must receive co-employee immunity* under §933 (i).

> Hughes' exclusive remedy therefore is under the Longshoremen's Act. The district court properly dismissed Canulette and Wall since the Longshoremen's Act grants them immunity from suit.

Id. at 1152. Therefore, inconsistent damages provisions of State law and the LHWCA will not be allowed to co-exist even though, as noted, concurrent compensation "benefits" can do so. It should also be noted that it is irrelevant whether or not the Petitioner in the foregoing cases or this case actually received LHWCA benefits because, where LHWCA coverage exists, supervisory and other fellow employees have a *federally protected right to co-employee immunity* in §933 (i) *regardless* of the decisions of Plaintiffs (or their counsel) with respect to which benefits scheme to pursue first - - State or Federal. *Keller, Nations, Chitty, supra.*

D. PETITIONER'S RELIANCE ON "TWILIGHT ZONE" CASES IS OF NO SIGNIFICANCE.

A few comments should also be made in reply to Petitioner's misplaced reliance on the series of cases, arising prior to the 1972 amendments to the LHWCA, which held that there was a "twilight zone" of maritime but local activity which the LHWCA did not purport to regulate and, for that reason, which State law could cover. These cases cited by Petitioner are *Davis v. Department of Labor,* 317 U.S. 249, 87 L.Ed. 246, 63 S. Ct. 225 (1942) and *Calbeck v. Travelers Insurance Co.,* 370 U.S. 114, 8 L.Ed.2d 368, 82 S. Ct. 1196 (1962) and *Hahn v. Ross Island Sand & Gravel Co.,* 358 U.S. 272, 79 S. Ct. 266, 3 L.Ed.2d 292

(1959). On the twilight zone doctrine, see generally Gilmore & Black, *The Law of Admiralty, supra.*

Under this law which has been rendered moot by the 1972 amendments to the Act, situations could and frequently did arise where in the twilight zone of maritime but local activity, an election of remedies could be made between potentially overlapping State and Federal compensation law. Thus, for example, a twilight zone employee could make a binding election of remedies in favor of State law which precluded recourse to the LHWCA. This fact situation occurred in the *Landry* decision, cited earlier, at the Benefits Review Board level in which the Board stated:

> We conclude that claimant is barred from relief under the Federal Act by the final judgment and satisfaction of his state claim.
>
> * * *
>
> [W]e conclude that under the doctrine of election of remedies, as well, claimant is barred from relief under the Federal Act by the final judgment and satisfaction of his Texas Act claim.

Landry v. Carlson Mooring Service, 9 BRBS 518, at 520 and 525 (1978), reversed 643 F.2d 1080 (5th Cir. April 27, 1981). As noted previously, however, this result was later reversed by the Fifth Circuit which held such an election of remedies was "irrelevant." *Landry, supra,* at 1087.

Hahn v. Ross Island Sand and Gravel Co., supra, is likewise inapplicable. Not only was this case decided on the Twilight Zone theory, it was based on a specific provision of the LHWCA [33 U.S.C. 903(a)] which was deleted by the

1972 Amendments to the LHWCA. Prior to the 1972 Amendments 33 U.S.C. 903(a) provided that the provisions and coverage of LHWCA did not apply "if recovery for disability and/or death through workmen's compensation proceedings may . . . *validly be provided by state law.*" (Emphasis supplied).

In the *Hahn* case the Court found the exception applied since Hahn's employer had "elected" not to participate in the state Workmen's Compensation Program. However, the provisions relied on by the Court in the *Hahn* case, *supra*, were deleted by the 1972 Amendments, *Director, etc. v. Perini North River Associates*, ___ U.S. ___, 74 L.Ed.2d 465, 103 S. Ct. 634, (1983). The 1972 amendments extended the scope of the LHWCA to cover the workers and the type work which Hahn was performing when injured. The 1972 Amendments eliminated the Twilight Zone theory on which the *Hahn* decision was based by deleting the exception on which the *Hahn* decision was premised. Thus, the decision has no application to the facts of this case. The "election" of remedies rationale in *Hahn*, it should be noted, has also been rejected by the former Fifth Circuit and this Court. See *Landry, supra*, and *Thomas v. Washington Gas Light, supra*.

It is therefore clear that the twilight zone cases relied on by Petitioner have been rendered moot by the decisions in *Landry* and *Sun Ship, supra*. Although an election of remedies was possible at one time for employees within the twilight zone, once the election of remedies possibility has been eliminated, and once the Supreme Court and Fifth Circuit has made clear that LHWCA and State benefits (but not damages) could overlap, this line of twilight zone cases mistakenly relied on by Petitioner are of historical interest only.

Other decisions have recognized that it was the clear intent of the 1972 amendments to the LHWCA for it to move *exclusively* into the twilight zone area. Such a statement clarifying the intent of Congress to give the LHWCA the fullest preclusive effect and inland extension possible in the 1972 amendments is noted as follows:

> In the 1972 amendments, however, Congress abandoned the policy of deferrance to state law-making power. It invaded what had theretofore been the sole preserve of the states by extending the LHWCA's coverage to some part of the domain in which the states could legislate.

Sea-Land Service, Inc., supra, at 636.

Given the foregoing discussion, there should be no doubt that the decision of the Alabama Supreme Court was correct in holding that §933(i) takes precedence over contrary State common law where there is a conflict between the co-employee immunity provisions of the LHWCA and of State law.

CONCLUSION

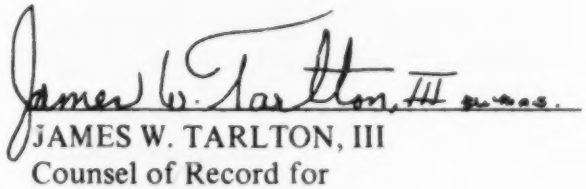
It is respectfully submitted that Petitioner has failed to sustain his burden under Rule 17 to demonstrate why there are special and important reasons why the writ should be granted. The Supreme Court of Alabama did not decide a federal question in conflict with the holding of this Court or any other federal court. The decision fully follows the holding of this Court in *Sun Ship, Inc., supra.* Furthermore, the decision establishes that under Alabama law, common law suits for damages against co-employees are not part of

the Alabama workmen's compensation scheme. Therefore, there is no conflict with the holdings of any other state court since only the Supreme Court of Alabama has the right to declare what Alabama law includes. Furthermore, the suit for damages against a co-employee is contrary to the immunity expressly granted to co-employees by 33 U.S.C. §933(i).

To uphold the position advocated by Petitioner would allow Petitioner to recover benefits under the State Workmen's Compensation Act and then sue a co-employee for damages. Such action for damages would abrogate the immunity granted co-employees under §933(i) LHWCA, would permit double recovery and would undermine the entire purpose of 33 U.S.C. §933(i).

We submit the Petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been served on James A. Yance, Esquire, Counsel of Record for Petitioner, on the 20th day of July, 1984, by United States Mail, postage prepaid, at his mailing address at Post Office Box 66705, Mobile, Alabama 36660.

James W. Tarlton, III

JAMES W. TARLTON, III